

CHAPTER 7

LAW OF THE SEA, AIR, AND SPACE

REFERENCES

1. United Nations Convention on the Law of the Sea (UNCLOS III) (1982).
2. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea Of 10 December 1982 (28 Jul 1994), A/RES/48/263 (33 ILM 1309).
3. Convention on the Territorial Sea and the Contiguous Zone (1958).
4. Convention on the Continental Shelf (1958).
5. Convention on the High Seas (1958).
6. Convention on Fishing and Conservation of the Living Resources of the High Seas (1958).
7. Convention on International Civil Aviation (Chicago Convention) (1944).
8. The Antarctic Treaty (1959).
9. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies (Outer Space Treaty) (1967).
10. Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched Into Outer Space (Rescue Agreement) (1968).
11. Convention on the International Liability for Damage Caused By Space Objects (Liability Convention) (1972).
12. Convention on Registration of Objects Launched Into Outer Space (Registration Convention) (1974).
13. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Treaty) (1979).
14. Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) (1963).
15. Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) (1970).
16. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention) (1971).
17. DoD 2005.1-M, Maritime Claims Reference Manual.
18. NWP 1-14M, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, 1997.
19. AFP 110-31, The Conduct of Armed Conflict and Air Operations, 1976.
20. CJCSI 2410.01B, Guidance for the Exercise of the Right of Assistance Entry, 1 May 2001.

INTRODUCTION

Unlike many other topics of instruction, which primarily address questions of “What” or “How,” this topic addresses the question of “Where.” In other words, what an individual or state may do depends on where the action is to take place.

This chapter will first discuss the various legal divisions of the land, sea, air, and outer space. Next, it will turn to the navigational regimes within each of those divisions. Finally, it will present the competencies of the coastal State over navigators within the divisions.

There are many sources of law which impact on this area, but three are particularly noteworthy.

United Nations Convention on the Law of the Sea (UNCLOS III).

Opened for signature on December 10, 1982, UNCLOS III entered into force on November 16, 1994 (60 ratifications). Previous conventions on the law of the sea had been concluded, but none were comprehensive as UNCLOS III. UNCLOS I (1958) was a series of 4 conventions (Territorial Sea/Contiguous Zone, High Seas, Continental Shelf, and Fisheries/Conservation). A major defect of these was the failure to define the breadth of the territorial sea. UNCLOS II (1960) was an attempt to resolve issues left unresolved in 1958. However, it closed without an agreement. UNCLOS III, which was negotiated over a period of nine years, created a structure for the governance and protection of the seas, including the airspace above and the seabed and subsoil below. In particular, it provided a framework for the allocation of *reciprocal rights and responsibilities*—jurisdiction, as well as navigational rights and duties—between States that carefully balances the interests of States in controlling activities off their own coasts and the interests of all States in protecting the freedom to use ocean spaces without undue interference.

On July 9, 1982, the United States announced that it would not sign the Convention, objecting to provisions related to deep sea-bed mining (Part XI of the Convention). In a March 19, 1983 Presidential Policy Statement, the United States reaffirmed that it would not ratify UNCLOS III because of the deep seabed mining provisions. The United States considers the navigational articles to be generally reflective of customary international law, and therefore binding upon all nations. In 1994, the UN General Assembly proposed amendments to the mining provisions. In October 1994, the Convention, as amended, was submitted to the Senate for its advice and consent. No action has been taken to date.

Convention on International Civil Aviation (Chicago Convention).

This 1944 Convention was intended to encourage the safe and orderly development of the then-rapidly growing civil aviation industry. It does not apply to state (military, police, or customs) aircraft. While recognizing the absolute sovereignty of the State within its national airspace, the Convention provided some additional freedom of movement for aircraft flying over and refueling within the national territory. The Convention also attempted to regulate various aspects of aircraft operations and procedures. This is a continuing responsibility of the International Civil Aviation Authority (ICAO), which was created by the Convention.

Outer Space Treaty of 1967.

This treaty limited State sovereignty over outer space. Outer space was declared to be the common heritage of mankind. It prevented certain military operations in outer space and upon celestial bodies, specifically, the placing in orbit of any nuclear weapons or other weapons of mass destruction, and the installation of such weapons on celestial bodies. Outer space was otherwise to be reserved for peaceful uses. Various other international conventions, such as the Moon, Registration, and Liability Treaties, expand upon provisions found in the Outer Space Treaty.

LEGAL DIVISIONS

The Earth's surface, sub-surface, and atmosphere are broadly divided into National and International areas.

National Areas.

Land Territory includes all territory within recognized borders. Although most borders are internationally recognized, there are still some border areas which are in dispute.

Internal Waters. These are all waters landward of the Baseline.¹ The Baseline is an artificial line corresponding to the low-water mark along the coast.² The coastal State has the responsibility for determining and publishing its baselines. The legitimacy of those baselines is determined by international acceptance or rejection of the claim. UNCLOS III recognizes several exceptions to the general rule:

¹ UNCLOS III, Article 8.

² UNCLOS III, Article 5.

Straight Baselines may be utilized by the coastal State when its coastline is deeply indented (e.g., Norway) or there are fringing islands.³ The lines drawn by the coastal State must follow the general direction of the coast. Straight baselines should not be employed to expand the coastal State's national areas. Straight baselines are also drawn across the mouths of rivers⁴ and across the furthest extent of river deltas or other unstable coastline features.⁵

Bays. Depending on the shape, size, and historical usage, the coastal State may draw a baseline across the mouth of a bay, which makes the bay internal waters. The bay must be a well-marked indentation, and more than a mere curvature in the coastline. A *juridical bay* (i.e., one defined by UNCLOS III) must have a water area greater than that of a semi-circle whose diameter is the length of the line drawn across its mouth (headland to headland) and the closure lines may not exceed 24 NM.⁶ *Historic bays* (bodies of water with closures of greater than 24 NM) may be claimed as internal waters where the following criteria is met: the claim of sovereignty is an open, effective, continuous and long term exercise of authority coupled with acquiescence—as opposed to mere absence of opposition—by foreign states.⁷ The United States does not recognize any claims to historic bay status, such as Libya's claim to the Gulf of Sidra (closure line in excess of 300 NM) or Canada's claim to Hudson Bay.

Archipelagic Baselines. UNCLOS III allows archipelagic States (those consisting of groups of islands) to draw baselines around their outermost islands, subject to certain restrictions.⁸ The waters within are given special status as archipelagic waters.

Maritime Claims Reference Manual. This DoD publication (available on the Internet at www.dtic.mil/whs/directives/corres/html/20051m.htm) sets out in detail all State claims, including specific points of latitude and longitude, and the U.S. position in regard to those claims.

Territorial Sea. That zone lying immediately seaward of the baseline. States must claim a territorial sea, to include its breadth. The maximum breadth is 12 NM.⁹ Most States, including the United States, have claimed the full 12 NM. Some States have claimed less than 12 NM, and some have made excessive claims of more than 12 NM. See the DoD Maritime Claims Reference Manual for claims of specific States, or NWP 1-14 (available on the Internet at <http://www.nwc.navy.mil/ILD/nwp-supp.pdf>) for a synopsis of State claims.

National Airspace includes all airspace over the land territory, internal waters, and territorial sea.¹⁰

International Areas

Contiguous Zone. That zone, immediately seaward of the territorial sea, extending no more than 24 NM from the baseline.¹¹

Exclusive Economic Zone. That zone, immediately seaward of the territorial sea, extending no more than 200 NM from the baseline.¹²

High Seas includes all areas beyond the Exclusive Economic Zone.¹³

³ UNCLOS III, Article 7.

⁴ UNCLOS III, Article 9.

⁵ UNCLOS III, Article 7(2).

⁶ UNCLOS III, Article 10.

⁷ UNCLOS III, Article 10(6).

⁸ UNCLOS III, Article 47.

⁹ UNCLOS III, Article 3.

¹⁰ UNCLOS III, Article 2.

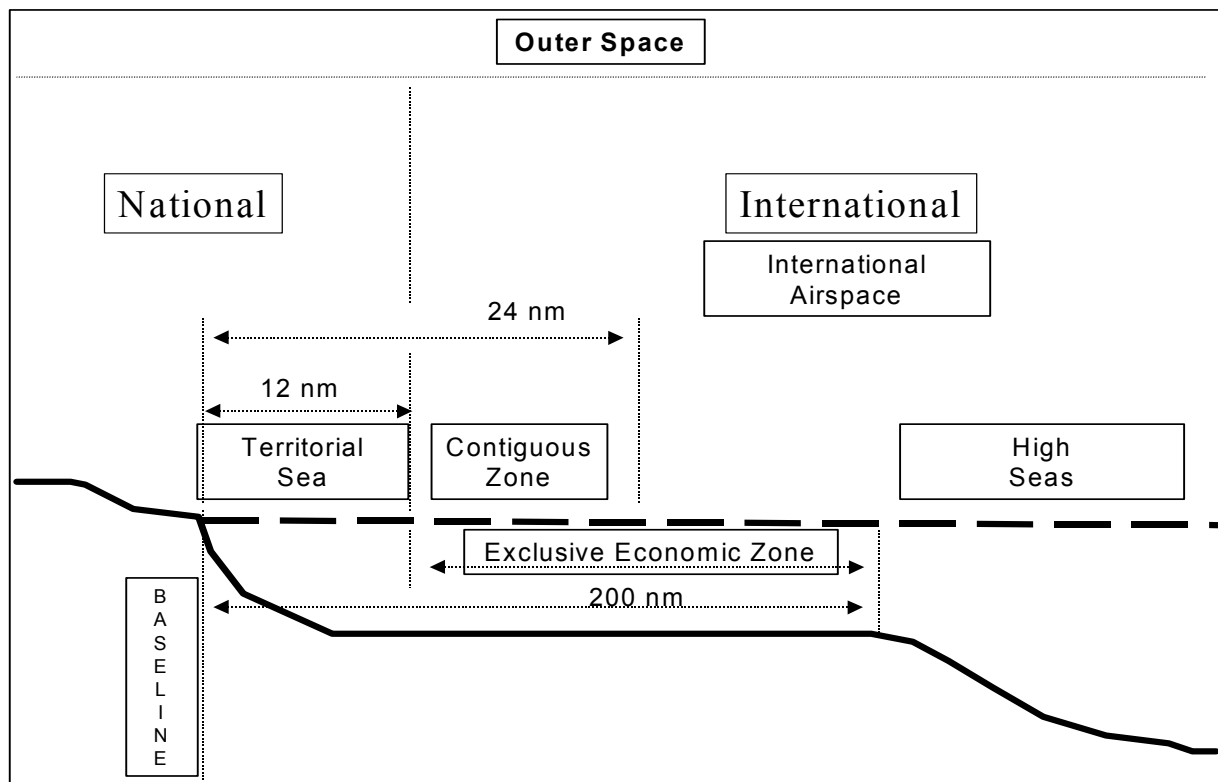
¹¹ UNCLOS III, Article 33.

¹² UNCLOS III, Articles 55, 57.

International Airspace includes all airspace beyond the furthest extent of the territorial sea.

Outer Space. The Outer Space Treaty and following treaties do not define the point where national airspace ends and outer space begins, nor has there been any international consensus on the line of delimitation. Some of the potential delimitations suggested include the upper limit of aerodynamic lift (approximately 80 km), the lowest satellite orbit (approximately 90 km), and the end of measurable air resistance (approximately 200 km).

Antarctica. The Antarctic Treaty applies to the area south of 60° South Latitude, reserving that area for peaceful purposes only. Specifically, “any measure of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapon,” is prohibited. However, the Treaty does not prejudice the exercise of rights on the high seas within that area.



NAVIGATIONAL REGIMES.

Now that the various legal divisions have been presented, the navigational regimes within those zones will be discussed. The freedom of navigation within any zone is inversely proportional to the powers that may be exercised by the coastal State (see the discussion below on State Competencies). Where the State has the greatest powers (e.g., land territory, internal waters), the navigational regime is most restrictive. Where the State has its least powers (e.g., high seas, international airspace), the navigational regime is most permissive.

National Areas.

With limited exception, States exercise full sovereignty within their national areas. The navigational regime is therefore Consent of the State. Although the State's consent may be granted based on individual requests, it may also be manifested generally in international agreements such as:

¹³ UNCLOS III, Article 86.

- *Status of Forces Agreements*. These agreements typically grant reciprocal rights, without the need for securing individual consent, to members of each State party. Such rights may include the right of entry and travel within the State.
- *Friendship, Commerce, and Navigation (FCN) Treaties*. These treaties typically grant reciprocal rights to the commercial shipping lines of each State party to call at ports of the other party.
- *Chicago Convention*. States party to the Chicago Convention have granted limited consent to aircraft of other State parties to enter and land within their territory.

The DoD Foreign Clearance Guide (DoD 4500.54-G, available on the Internet at <http://www.fcg.pentagon.mil/fcg/fcg.htm>) sets out the entry and clearance requirements for both aircraft and personnel, and overflight rights where applicable, for every country.

Exceptions in the Territorial Sea. Although the territorial sea is a national area, the need for greater freedom of navigation than consent of the coastal State has convinced the international community to recognize the following exceptions. Note that these exceptions do not apply to internal waters, for which consent remains the navigational regime.

Innocent Passage. Innocent passage refers to a vessel's right to *continuous* and *expeditious* transit through a coastal State's territorial sea for the purpose of traversing the seas without entering a State's internal waters.¹⁴ Stopping and anchoring is permitted when (1) incident to ordinary navigation, or (2) made necessary by *force majeure* (e.g., mechanical casualty, bad weather, other distress). Passage is innocent so long as it is not prejudicial to the peace, good, order, or security of the coastal State. There is no provision in international law for prior notification or authorization in order to exercise that right. UNCLOS III contains no requirement that passage through a State's territorial sea be *necessary* in order for it to be innocent; it does, however enunciate a list of activities not deemed to be innocent:

- any threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal state or other acts in violation of the principles of international law as embodied in the UN Charter;
- any exercise or practice with weapons of any kind;
- any act aimed at collecting information to the prejudice of the security of the coastal state;
- any act of propaganda aimed at affecting the defense or security of the coastal state;
- launching, landing, or taking on board of any aircraft;
- the launching, landing, or taking on board of any military device;
- loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration, or sanitary laws and regulations of the coastal state;
- any willful and serious pollution;
- any fishing activities;
- the carrying out of any research or survey activity;
- any act aimed at interfering with any system of communication or any other facilities or installations of the coastal state; and

¹⁴ UNCLOS III, Article 18.

- any other activity not having a direct bearing on passage.¹⁵

The United States takes the position that the above list is exhaustive and intended to eliminate subjective determinations of innocent passage; if a vessel is not engaged in one of the above listed activities, its passage is deemed innocent.

Innocent passage extends to all shipping and is not limited by cargoes, armament, or type of propulsion. Note that UNCLOS III prohibits coastal state laws from having the practical effect of denying innocent passage.

Innocent Passage does not apply to aircraft. Submarines in innocent passage must transit on the surface, showing their flag.¹⁶

Challenges to Innocent Passage: (1) Merchant ships must be informed of the basis for the challenge and provided an opportunity to clarify intentions or correct the conduct at issue. Where no corrective action is taken by the vessel, the coastal State may require it to leave or may, in limited circumstances, arrest the vessel. (2) A warship / state vessel must be challenged and informed of the violation that is the basis for the challenge. Where no corrective action is taken, the coastal State may require the vessel to leave its territorial sea and may resort to minimum force to enforce the ejection.¹⁷

Suspension of Innocent Passage: A coastal state may temporarily suspend innocent passage if such an act is essential for the protection of security. Such a suspension must be (1) non-discriminatory; (2) temporary; (3) applied to a specified geographic area; and (4) imposed only after due publication / notification.¹⁸

Right of Assistance Entry. Based on the long-standing obligation of mariners to aid those in peril on the sea, the right of assistance entry gives limited permission to enter into the territorial sea to render assistance to those in danger. The location of the persons in danger must be reasonably well known. The right does not permit a search. Aircraft may be used to render assistance, though this right is not as well recognized as that for ships rendering assistance. See CJCSI 2410.01A for further guidance on the exercise of the right of assistance entry (available on the Internet at http://www.dtic.mil/doctrine/jel/cjcsd/cjcsi/2410_01b.pdf).

Transit Passage. Transit passage applies to passage through *International Straits*, which are defined as: (1) routes between the High Seas or Exclusive Economic Zone and another part of the High Seas or Exclusive Economic Zone;¹⁹ (2) the strait must be overlapped by the territorial sea of one or more coastal states; (3) there must be no High Seas or Exclusive Economic Zone route of similar convenience;²⁰ (4) natural, not constructed (i.e., Suez Canal); and (5) must actually be used for international navigation. The U.S. position is that the strait must be susceptible to such use.

Transit passage is unimpeded, continuous, and expeditious passage through the strait.²¹ The navigational regime is Normal Mode.²² In Normal Mode ships may launch and recover aircraft if that is normal during their navigation and submarines may transit submerged. Aircraft may exercise transit passage. Transit passage may not be suspended by the coastal states.²³

Archipelagic Sea Lanes Passage (ASLP). ASLP is the exercise of rights of navigation and overflight, in the normal mode of navigation, solely for the purpose of continuous, expeditious, and unobstructed transit between one part

¹⁵ UNCLOS III, Article 19.

¹⁶ UNCLOS III, Article 20.

¹⁷ UNCLOS III, Article 30.

¹⁸ UNCLOS III, Article 25(3).

¹⁹ UNCLOS III, Article 37.

²⁰ UNCLOS III, Article 36.

²¹ UNCLOS III, Article 38.

²² UNCLOS III, Article 39.

²³ UNCLOS III, Article 44.

of the High Seas / Exclusive Economic Zone and another part of the High Seas / Exclusive Economic Zone through archipelagic waters.²⁴

Qualified archipelagic states may designate sea lanes for the purpose of establishing the Archipelagic Sea Lanes Passage regime within their Archipelagic Waters. States must designate *all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters* and the designation must be referred to the International Maritime Organization (IMO) for review and adoption. In the absence of designation, the right of ASLP may be exercised through all routes normally used for international navigation.²⁵ Once Archipelagic Sea Lanes are designated, transiting ships and aircraft may not deviate more than 25 NM off the ASL axis and must stand off the coastline no less than 10% of the distance between the nearest points of land on the islands bordering the sea lane. Once ASLs are designated, the regime of innocent passage applies to Archipelagic Waters outside the sea lanes. Archipelagic Sea Lanes Passage is non-suspendable; however, if ASLs are designated, innocent passage outside the lanes—but within Archipelagic Waters—may be suspended in accordance with UNCLOS III.

International Areas.

In all international areas, the navigational regime is Due Regard for the rights of others.²⁶ Although reserved for peaceful purposes, military operations are permissible in international areas. The U.S. position is that military operations which are consistent with the provisions of the United Nations Charter are “peaceful.”

STATE COMPETENCIES

General. The general rule is that the flag state exercises full and complete jurisdiction over ships and vessels that fly its flag. The United States has, in 18 U.S.C. § 7, defined the “special maritime and territorial jurisdiction” of the United States as including registered vessels, U.S. aircraft, and U.S. space craft. Various federal criminal statutes are specifically made applicable to acts within this special jurisdiction. The power of a State over non-flag vessels and aircraft depends upon the zone in which the craft is navigating (discussed below) and whether the craft is considered state or civil.

State craft. State Ships include warships²⁷ and ships owned or operated by a State and used only for government non-commercial service. State Aircraft are those used in military, customs and police services.²⁸

Civil craft are any craft other than state craft. States must set conditions for the granting of nationality to ships and aircraft. Craft may be registered to only one State at a time.

National Areas.

Land Territory and Internal Waters. Within these areas, the State exercises complete sovereignty, subject to limited concessions based on international agreements (e.g., SOFA, etc.).

Territorial Sea. As noted above, the navigational regime in the territorial sea permits greater navigational freedom than that available within the land territory or inland waters of the coastal State. The state competency within the territorial sea is, therefore, somewhat less than full sovereignty.

Innocent Passage.

²⁴ UNCLOS III, Article 53.

²⁵ UNCLOS III, Article 53(12).

²⁶ UNCLOS III, Article 58 for the Exclusive Economic Zone, Article 87 for the High Seas.

²⁷ “For the purposes of this Convention, “warship” means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.” Article 29, UNCLOS III.

²⁸ Article 3, Chicago Convention.

Civil. The State's power is limited to: (1) Safety of navigation, conservation of resources, control of pollution, and prevention of infringements of the customs, fiscal, immigration, or sanitary laws; (2) Criminal enforcement, but only when the alleged criminal act occurred within internal waters, or the act occurred while in innocent passage, and it affects coastal state;²⁹ (3) Civil Process, but the coastal State may not stop ships in innocent passage to serve process, and may not arrest ships unless the ship is leaving internal waters, lying in territorial sea (i.e., not in passage), or incurs a liability while in innocent passage (i.e., pollution).³⁰

State. State vessels enjoy complete sovereign immunity.³¹ The flag State bears liability for any costs that arise from a state vessel's violation of any of the laws that would otherwise be applicable to civil vessels.³² The coastal State's only power over state vessels not complying with their rules is to require them to leave the territorial sea immediately.

Transit Passage and Archipelagic Sea Lane Passage.

Civil. The coastal State enjoys almost no State competencies over those craft in transit passage or archipelagic sea lane passage, other than those competencies applicable within the Contiguous Zone and Exclusive Economic Zone. These include customs, fiscal, immigration, and sanitary laws, and prohibitions on fishing. Additionally, the coastal State may propose a traffic separation scheme, but it must be approved by the International Maritime Organization.

State vessels enjoy complete sovereign immunity. The flag State bears liability for any costs that arise from a state vessel's violation of any of the laws that would otherwise be applicable to civil vessels.

International Areas.

Contiguous Zone. The Contiguous Zone was created solely to allow the coastal State to exercise its customs, fiscal, immigration, and sanitary laws.³³

Exclusive Economic Zone. Within this area, the coastal State exercises sovereign rights for managing the natural resources.³⁴ Coastal State consent is required for marine scientific research (no exception for State vessels), but such consent should normally be given.³⁵

High Seas.

Civil. On the high seas, the general rule is flag state jurisdiction only.³⁶ Non-flag States have almost no competencies over craft on the high seas, with the following exceptions:

- Ships engaged in the slave trade.³⁷ Every State is required to take measures to suppress the slave trade by its flagged vessels. If any other State stops a slave vessel, the slaves are automatically freed.
- Ships or aircraft engaged in piracy.³⁸ Any State may seize, arrest, and prosecute pirates.

²⁹ UNCLOS III, Article 27.

³⁰ UNCLOS III, Article 28.

³¹ UNCLOS III, Article 30.

³² UNCLOS III, Article 31.

³³ UNCLOS III, Article 33.

³⁴ UNCLOS III, Article 56.

³⁵ UNCLOS III, Article 246.

³⁶ UNCLOS III, Article 92,

³⁷ UNCLOS III, Article 99.

- Ship or installation (aircraft not mentioned), engaged in unauthorized broadcasting.³⁹ Any State which receives such broadcasts, or is otherwise subject to radio interference, may seize and arrest the vessel and persons on board.
- Right of visit.⁴⁰ The right of visit, which is quite similar to a traffic stop to check license and registration, may only be conducted by state ships and aircraft. There must be a reasonable suspicion that: (1) the ship visited is engaged in slave trade, piracy, or unauthorized broadcasting; (2) the ship is without nationality (a ship that belongs to no state belongs to all States); or (3) the ship, although flying a foreign flag, actually is of the same nationality of the visiting state ship or aircraft. The visiting State ship may ask to see the visited ship's documents.
- Hot Pursuit.⁴¹ Again only conducted by state ships and aircraft, craft which have committed some prohibited act may be pursued and captured upon the high seas. The pursued ship must have violated a law or regulation of the coastal state in any area in which those laws or regulations are effective. For example, the ship must have violated a customs rule within the CZ, or a fishing regulation within the Exclusive Economic Zone. The pursuit must commence in the area where the violation was committed, and must be continuous. Pursuit must end once the ship enters the territorial sea of another state, including its own.
- Terrorism. Over the past 30 years, nations have attempted to combat the problem of criminal interference with aircraft, specifically hijacking. To deter hijackers these legal strategies must be supported by strengthened airport security, commitment to prosecute terrorists, and sanctions against states that harbor terrorists. Hijacking is usually not an act of piracy as defined under UNCLOS III. Nations have entered into multilateral agreements to define the offense of hijacking and deter hijacking as a method of terrorism. These conventions include the Tokyo Convention, Hague Convention, and Montreal Convention.

State. State vessels are absolutely immune on the high seas.⁴²

³⁸ UNCLOS III, Articles 101-107.

³⁹ UNCLOS III, Article 109.

⁴⁰ UNCLOS III, Article 110.

⁴¹ UNCLOS III, Article 111.

⁴² UNCLOS III, Article 95.

| Legal Division | Navigational Regime | State Competency |
|-------------------------|-------------------------------|--|
| Land Territory | Consent | Full sovereignty |
| Internal Waters | Consent | Full sovereignty |
| Territorial Sea | Innocent Passage (ships only) | Limited navigational, criminal, and civil |
| International Straits | Transit Passage/Normal mode | Fiscal, customs, immigration, and sanitary |
| Archipelagic Sea Lanes | Archipelagic Sea Lane Passage | Fiscal, customs, immigration, and sanitary |
| Contiguous Zone | Due Regard | Fiscal, customs, immigration, and sanitary |
| Exclusive Economic Zone | Due Regard | Natural resources |
| High Seas | Due Regard | Almost none |